At the hearing, our attention was drawn to the unrefuted revelation made at the Bar that in defiance of the ethics and code of conduct of the profession, and without giving an assurance that the fees of the architects would be safeguarded, another firm of architects had, on the instructions of the developers, submitted plans for the development of the land, the new development is now approaching a completion, and when it is completed and the several parts of the complex sold, there would be nothing left which the architects could attach for any judgment they might obtain, since the developers were a one-project concern. We do not think this a matter of relevance.

We would conclude by making it clear that, if necessary, by suitable amendments, the developers might pursue, if they were so advised, their claim for such damages as flow from any negligence they could prove on the part of the architects. For that reason, Mr. Cecil Abraham for the architects, had himself suggested that the judgment sum be deposited in court to await the outcome of the developers' counterclaim. We so order. We make a further order that the deposit be made within two weeks from date hereof.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Rithaudeen & Aziz.*

DIAMOND PEAK SDN. BHD. & ANOR. v. TWEEDIE

[F.C. (Raja Azlan Shah C.J., (Malaya), Chang Min Tat F.J. & Abdoolcader J.) December 4, 1979 & January 21, 1980]

[Penang — Federal Court Civil Appeal No. 44 of 1979]

Practice and Procedure — Action for specific performance of agreement for sale of land or damages — Application for summary judgment — Application dismissed by judge who also dismissed action — Whether judge has power to do so — Triable issues — Unconditional leave to defend should have been given — R.S.C. 1957, O. 14, O. 14A, rr. 1 and 4, O. 25 rr. 2 and 3, O. 30 r. 1(3).

Contract — Whether contract constituted by letters between parties — Acceptance conditional on formal contract being drawn up — Submission that correspondence did not contain all terms of contract — Failure to complete contract — Caveat entered against land.

In this case the appellants claimed specific performance of a contract for the sale of land which he claimed was embodied in an exchange of letters between the parties. The respondents had failed to complete the contract and the first appellant had lodged a caveat against the land. The respondents had applied for the removal of the caveat. The learned trial judge heard both applications and he allowed the respondent's application with costs and ordered the removal of the caveat, dismissed the appellant's application under Order 14A with costs and then went on to further order the dismissal of the appellant's action out of court with taxed costs. The appellants appealed.

Held: (1) the learned judge had no power in an application for summary judgment to dismiss the action. All that was open to him to do in regard to the appellant's application for summary judgment under Order 14A was to give the respondent unconditional leave to defend;

(2) it clearly appeared from the facts and the circumstances of this case that there were in fact highly triable issues in the matter and the learned judge should therefore have given the respondent unconditional leave to defend.

Cases referred to:-

(1) *Bigg & Anor.* v. *Boyd Gibbins Ltd.* [1971] 2 All E.R. 183, 184.

(2) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212; [1979] 3 W.L.R. 373.

(3) *Von-Hatzfeldt Wildenburg* v. *Alexander* [1912] 1 Ch. 284.

(4) *Lockett* v. *Norman-Wright* [1925] 1 Ch. 56.

(5) *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.

(6) *Gibson* v. *Manchester City Council* [1979] 1 W.L.R. 294, 297.

(7) *Butler Machine Tool Co. Ltd.* v. *Ex-Cell-O Corporation (England) Ltd.* [1979] 1 W.L.R. 401, 405.

(8) *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha and Telegraph Works Company* (1875) L.R. 10 Ch. A. 515, 526.

HIGH COURT.

Lim Kean Chye (*Lim Cheng Chuan* with him) for the plaintiffs.

W.S.W. Davidson (*V. Thevendran* with him) for the defendant.

Cur. Adv. Vult.

Arulanandom J.: There are in this matter two applications before me. The first one (Encl. 10) was filed on July 28, 1978 by the defendants for an order pursuant to section 327 of the National Land Code for the removal of a Private Caveat Jil. No. 20 Fol. No. 11 dated April 8, 1978, on Lots 521, 514, 522 and 538 Mukim 2 D.B.D. Pulau Pinang lodged by the first plaintiffs in this suit. The second application (Encl. 12) was filed on July 31, 1978, by the plaintiffs for an order pursuant to Order 14A of the Rules of the Supreme Court for an Order for Specific Performance of the agreement in the writ in this action.

As the applications were inter-related in that the result of one would affect the other, I heard both applications together with the consent of counsel.

The plaintiffs' claim as set out in the indorsement of the writ is as follows: —

"(1) Specific performance of an agreement embodied in an exchange of letters between the second plaintiff and the defendant dated February 3, 1978 and February 6, 1978 respectively for the sale by the defendant to the plaintiffs of certain lands known as Holding Nos. 514, 521, 522 and 538 Mukim 2, situate in the South West District, Penang.

(2) In the alternative specific performance of the said agreement as varied by subsequent letters ending with the second plaintiff's solicitors' letter of May 5, 1978.

(3) Further and in the alternative damages for breach of contract.

(4) Further or other relief.

(5) Costs."

In reply to this the defendant in his affidavit denies that there was ever any concluded contract for the sale of his lands to the plaintiffs and that whatever negotiations there might have been were terminated when the plaintiff failed to comply with the terms of the defendant's solicitor's letter dated May 8, 1978.

The court must therefore in the first instance decide whether there is a triable issue. If there is, then, the plaintiffs' application for summary judgment will have to be dismissed and the defendant's application for removal of the caveat will have to be dismissed.

According to the plaintiff the defendant's offer to sell the lands viz. Holdings known as Nos. 514, 521, 522 and 538 Mukim 2, situate in the South West District, Penang (hereinafter referred to as the said lands) was contained in his letter dated December 12, 1977 and addressed to the 2nd plaintiff. In that letter the defendant writes *inter alia* "The arrangement we came to was that if the present option-holders — to sell the 17 acres for $340,000 — do not succeed by the time the option expires January 31, 1978 — you have the right to buy the land for $300,000, payable in $30,000 instalments over 10 years, starting on February 1, 1978."

This letter was written a day after the defendant met the 2nd plaintiff for the first time as he writes: "It was a great pleasure meeting you yesterday at "Bu Fo" (Portuguese for "Good Faith") and hope we meet many times in the future." The letter concludes as follows: "I hope the deal comes off as I would like to have you and your medical relatives as neighbours. With very best wishes, Yours sincerely, D.R. Tweedie." (Encl. A to Encl. 9). I have quoted the letter at length as I will have reason to comment on it later.

In reply to that the defendant was written a letter dated February 3, 1978. The letter was written on paper with the letter-head "Chong Keat Sdn. Bhd." and signed "Yours faithfully, Tan Chong Keat," but with the signature sandwiched between the words "Chong Keat Sdn. Bhd." and "Director" which had been rubber-stamped below the words "Yours faithfully."

In the body of the letter the writer states as follows:

"We agreed to the terms and conditions of your offer and the manner of payment that is

1. The price of $300,000 for all the abovementioned lots of approximately 17 acres of property at Telok Bahang.
2. Payments will be made in ten (10) instalments. Each instalment of $30,000 will be spread over a period of ten (10) years.
3. Transfer of the property to be made on payment of the first instalment, but we let you have our mortgage in return for security.
4. Vacant possession to be given on the first payment of the property.

Our Lawyer is Lim Cheng Chuan & Co. of 20-A, Beach Street, Penang. We will instruct him to write to you."

The defendant sent a reply on February 6, 1978. In it he states as follows: "As I said before I am delighted it is you who is buying the land.... The technical details I will leave to my lawyers, Lewis & Co., the partner who kindly deals with my affairs is W.S.W. Davidson (Bill)."

The plaintiffs claim that the exchange of these letters embodied a concluded contract which they now require the defendant to specifically perform. While it is true that by an exchange of letters parties can enter into a valid and enforceable contract, it does not necessarily follow that every exchange of letters in contemplation of a contract can be construed as a valid and enforceable contract.

The first is the question of parties. The defendant's first letter of December 12, 1977 which is referred to in the 2nd plaintiff's letter of February 3, 1977 is addressed to the second plaintiff personally — to "Dear Mr. Tan." But the letter of February 3, 1978 is on the letterhead of Chong Keat Sdn. Bhd. which is a Private Limited Company, which is a completely different entity from the plaintiffs in this suit. The use of the letterhead cannot be dismissed as insignificant and the letter treated as a personal letter from the second plaintiff because the letter is not signed as if it was personal but signed under the rubber stamp of the company as a Director. Hence it cannot be contended that the present plaintiffs were the ones with whom the defendant was negotiating for the sale of his lands.

Secondly, while it does appear that the defendant intended to sell his lands, from the tone and contents of both his letters of December 12, 1977 and February 6, 1978 it cannot be concluded that he had a definite contractual intent. Both letters are essentially personal commencing with "Dear Mr. Tan" and concluding with "Yours sincerely." The letters of the defendant in contrast to the letters of the second plaintiff are friendly, include matters completely unconnected with the transaction in hand and the letter of February 6, 1978 ends with "I wish you all the happiness in the New Year — Kong Hee Fatt Choy." The fact that the defendant did not have any contractual intent does not necessarily mean that the second plaintiff was not contemplating a contract. The letter of February 3, 1978 is formal and contains what the second plaintiff refers to as the agreed terms and conditions of the sale. The letter sets out four terms but in considering the terms in the light of the defendant's letter the only agreement is for the sale of the land for $300,000 but none of the other terms were agreed on or even negotiated. As is apparent from the subsequent letters the defendant was in no position to enter into a contract for sale of the property and execute valid and registrable transfer as his titles were all with a bank which had a lien on them for his overdraft. One of the terms contained in the letter of February 3, 1978 is that payment will be made in ten instalments of $30,000 spread over ten years but nothing has been agreed on when the instalments would commence.

The wording of the defendant's letter of February 6, 1978 where he refers to "The technical details I will leave to my lawyer, Lewis & Co., Ipoh. The partner who deals with my affairs is W.S.W. Davidson" as considered in the context of the letter as a whole cannot be construed as meaning "My lawyers will put all those terms into formal legal language" but be given the clear and straightforward meaning that while he is willing to sell the land there are lots of other matters to be negotiated on and agreed upon before the agreement for sale can be concluded.

The subsequent letters between the parties referred to in the plaintiffs' alternative prayer all go to confirm that there not only was no concluded agreement of sale in the exchange of the letters of February 3, 1978 and February 6, 1978 but there were several important terms to be agreed upon before the defendant could even agree to sell. All the letters show is that there was a commencement of negotiations

which were pursued in quite an amicable manner — with terms *inter alia* (a) as to the first instalment of $60,000 to be paid, (b) the transfer only to be completed when the full purchase price has been paid, (c) the directors of the purchasing company including 2nd plaintiff giving personal guarantees for the payment of the charge, if any, being agreed upon. But unfortunately before the agreement could be concluded negotiations were terminated and the defendant withdrew his offer for sale contained in his letter of December 12, 1977.

Even if the court were to include the defendant's letter as the 'offer' (which is not the basis of the plaintiffs' case the plaintiffs consider the 2nd plaintiff's letter of February 3, 1978) then the letter of the plaintiffs of February 3, 1978 was not an unconditional acceptance but set out terms and conditions which were unacceptable to the defendant.

In considering all the circumstances and the fact the court has no alternative but to make a finding that there was no concluded contract between the parties on which a claim for specific performance can be founded.

Having come to this conclusion the plaintiffs' application for summary judgment is hereby dismissed with costs.

But the matter does not end there. The finding of the court is not that there are triable issues which justify the dismissal of the application for summary judgment but that there was no concluded contract on which a claim for specific performance could be founded. In other words, by this finding the whole issue in the suit has been disposed of and dealt with conclusively. The plaintiffs' claim is based purely on documents and an interpretation has been made as to the meaning and significance of the documents. Hence there are no issues to go for trial.

In the case of *Bigg & Anor.* v. *Boyd Gibbins Ltd.*[1] Russell L.J. had this to say:

"This came before Pennycuick V-C as a matter which involves solely the question whether on the true construction of a few letters passing between the plaintiffs and the defendants (the plaintiffs being the vendors and the defendants being the proposed purchasers) there was a concluded contract. With the matter being dealt with under R.S.C. Order 86, it is I think right to say that an order should be made only if the judge thinks that it is a plain case and ought not therefore to be tried. Speaking for myself, I should have thought that it would be sensible that if one has simply a short matter of construction, with a few documents, the learned judge on this summary application should simply decide what is in his judgment the true construction. There could be no reason to go formally to trial (except that one might possibly come before another judge) where no further facts could emerge which would throw any light at all on the letters that have to be construed.

The matter comes before this court on appeal, the argument being that anyway the learned judge was wrong in saying that this matter of construction was plain and that therefore he should not, in the exercise of the summary jurisdiction, have made the final order for specific performance which he did under R.S.C. Order 86. As a consequence of a suggestion that came from the Bench in this court, so as to avoid duplication of proceedings, when clearly nothing is to be gained by having a trial, even if we were to decide that the judge was wrong on the 'plain case' point, it has been agreed by counsel, on instructions from their clients, that this appeal should be dealt with as if it was an appeal from the trial of the action; that is to say, the parties consent to our dealing with this appeal as if the hearing before Pennycuick V-C was the trial of the action. In the result, subject to a point which I shall refer to at the end of my judgment, we are not concerned with whether this is a plain case; we are only concerned with what, in our judgment, is the true construction of the letters."

This being a Court of Appeal judgment I am inclined to follow it.

In this case there are no issues to be brought for trial. It will only be a waste of time and an exercise in futility.

The order of the court then is that the suit is hereby dismissed with costs.

In view of the above order the plaintiff has no further right to lodge or retain a caveat against the defendant's said lands. The defendant's application for the removal of the said caveat Jil. No. 20 Fol. 11 dated April 8, 1978, is hereby allowed with costs.

From the above judgment the defendant appealed to the Federal Court.

FEDERAL COURT.

Lim Kean Chye for the appellants.

T.R. Hepworth (*W.S.W. Davidson* with him) for the respondent.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The appellants issued the writ in these proceedings on June 27, 1978 claiming in the indorsement specific performance of an agreement alleged to have been embodied in an exchange of letters between the 2nd appellant and the respondent dated February 3 and 6, 1978 respectively or, in the alternative, of such agreement as varied by subsequent correspondence ending with the 2nd appellant's solicitors' letter of May 5, 1978, for the sale by the respondent to the appellants of some 17 acres of land in the south west district of Penang and further or in the alternative damages for breach of contract, concluding in stock fashion with the ubiquitous prayers for further or other relief and costs. There then follows an indorsement to the effect that 'the 1st (appellant) sues as assignee or alternatively as party to the contract by novations' but the affidavits filed make no disclosure in regard to this assertion as to how this came about. The 1st appellant had apparently lodged a caveat against the land in question on April 8, 1978. The respondent applied by summons on July 28, 1978 for an order for the removal of this caveat under section 327 of the National Land Code and on July 31, 1978 the appellants applied for summary judgment under the provisions of Order 14A of the Rules of the High Court, 1957 for an order for specific performance of the agreement referred to in the writ in terms of the minutes of the judgment sought annexed to their summons.

The learned judge heard both applications together on October 4, 1978 and in a reserved judgment on January 17, 1979 allowed the respondent's application with costs and ordered the removal of the caveat, dismissed the appellants' application under Order 14A with costs and then went on to further order the dismissal of the appellants' action out of court with taxed

costs to the respondent. The appellants now appeal to us against the learned judge's order made on January 17, 1979 but although their notice of appeal is against the whole of that decision, Mr. Lim Kean Chye for the appellants has indicated that he is not proceeding with the appeal in respect of the removal of the caveat and this therefore obviates the necessity for a consideration and application in this respect of the principles enunciated by the Judicial Committee of the Privy Council in *Eng Mee Yong & Ors.* v. *V. Letchumanan*[2] with regard to applications for the removal of private caveats.

We are accordingly concerned only with the learned judge's order in respect of the appellants' application for summary judgment for specific performance under Order 14A and the dismissal of the action. Mr. Hepworth for the respondent, in answer to a question we put to him at the outset of the hearing of this appeal, maintains that it was open to the learned judge to come to a firm conclusion on the Order 14A summons that there was no binding and concluded contract between the parties for the sale of the land and to dismiss both the application and the action itself and that he was correct in doing so, and indeed Mr. Davidson who appeared for the respondent in the High Court urged the learned judge to decide whether or not there was a contract and at the end of his submission specifically asked for a ruling on the contract. Mr. Lim Kean Chye tells us rather candidly, and we would add in our view very properly, that he would have been quite content if the respondent had been given unconditional leave to defend. He submits that the learned judge has no power under Order 14A to dismiss the action, and without detracting from his argument that there is in fact a concluded contract, cautiously concedes, perhaps to minimise the potential or possible potency of anything more precise or effusive, that there is some scope for argument to entitle the respondent to defend the action. It would appear to be abundantly clear that the gravamen of the appellants' grievance in this appeal is the order of the learned judge that their action do stand dismissed out of court and that the crunch of their complaint is primarily in that respect. It is however necessary for us to consider all the facts and circumstances in this matter to determine whether the appellants are entitled to summary judgment in the action under Order 14A or whether the respondent has a good defence thereto on the merits or has disclosed facts sufficient to entitle him to defend.

The basis of the appellants' claim is that the letters of February 3 and 6, 1978 or in the alternative these two letters as varied by subsequent correspondence ending with the 2nd appellant's solicitors' letter of May 5, 1978 constitute a binding and enforceable contract and in the circumstances it will be necessary to refer to the whole of the correspondence that ensued. The matter was initiated by a letter of December 12, 1977 from the respondent to the 2nd appellant referring to the arrangement they had come to in the following terms:

"The arrangement we came to was that if the present option-holders — to sell the 17 acres for $340,000 — do not succeed by the time the option expires, January 31, 1978, — you have the right to buy the land for $300,000 payable in $30,000 instalments over 10 years, starting on February 1, 1978."

The respondent wrote again to the 2nd appellant on January 30, 1978 to inquire if he was 'still interested in buying the 17 acres, as *per* my letter of December 12, 1977' and if so requesting a reply by return as there were other people wanting an option and reiterating that he would prefer that the 2nd appellant bought the land. The response to this letter was a letter dated February 3, 1978 addressed to the respondent written under the letterhead of Chong Keat Sdn. Bhd. and signed by the 2nd appellant as a director of that company and rubber-stamped to that effect. The body of that letter is material and reads, cacographic and syntactic deviations and all:

"We refer to your letters of December 12, 1977 and January 30, 1978 regarding the abovementioned property. We agreed to the terms and conditions of your offer and the manner of payment that is —

1. The price is $300,00 for all the abovementioned lots of approximately 17 acres of property at Telok Bahang.
2. Payments will be made in ten (10) instalments. Each installments of $30,000 will be spread over a period of ten (10) years.
3. Transfer of the property to be made on payment of the first installment, but we let you have our morgage in return for security.
4. Vacant possession to be given on the first payment of the property.

Our Lawyer is Lim Cheng Chuan & Co. of 20-A, Beach Street, Penang. We will instruct him to write to you. We hope that the matter could be finalised soon."

This letter purports to introduce stipulations regarding vacant possession to be given and transfer of the property to be made on payment of the first instalment but subject to a charge. Mr. Lim Kean Chye in the course of his submission indicates that he might well have to adduce parol evidence if the matter proceeds to trial of an oral agreement between the parties, and perhaps this may even extend to the telephone conversations between the respective solicitors referred to in later correspondence which we will presently advert to.

The respondent wrote in reply to the 2nd appellant personally on February 6, 1978 expressing delight that it was he who was buying the land and stating *inter alia* that he would leave the technical details to his lawyers Lewis & Co. Ipoh and that the partner who deals with his affairs was W.S.W. Davidson. The respondent then received a letter dated February 18, 1978 from Lim Cheng Chuan & Co. enclosing on the instructions of their client the 2nd appellant, 'the intending purchaser', a draft Agreement of Sale (which however specified the 1st appellant as purchaser and contained material terms which the respondent says were not agreed upon) for his approval and intimating that the 2nd appellant had deposited with them the sum of $30,000. The respondent's solicitors wrote to Lim Cheng Chuan & Co. on February 22, 1978 referring to their letter of February 18 and a telephonic conversation between them and intimating the respondent's agreement in principle to the sale but raised several points on the draft agreement and in effect counter-offered conditions for acceptance with regard to the amount of the initial payment in view of a bank lien on the title deeds of the property in respect of some $52,000 owing by the respondent, the matter of personal guarantees to be given and a stipulation for the whole outstanding balance to become due and payable on default of payment of any one instalment.

The respondent's solicitors received a reply thereto dated March 13, 1978 again referring to a telephonic conversation with Mr. Davidson and enclosing 4 copies of the Agreement of Sale, Transfer and Charge for execution and return together with a cheque for $30,000 being the deposit and payment to account. The first paragraph referred to Mr. Davidson's confirmation over the telephone that the respondent had agreed to accept $30,000 deposit instead of $60,000, and this may well again necessitate oral evidence being adduced as the respondent contends that the first of his conditions on the amount of the first payment in his solicitors' letter of February 22 had not been accepted. The requirements set out in the respondent's solicitors' letter of February 22 had not been complied with except in respect of the personal guarantees asked for. As a result the respondent's solicitors replied on March 15, 1978 basically to the effect that the respondent had never agreed to transfer title on receipt of the first payment and stating that unless and until the terms of the agreement had been finally settled they were instructed not to accept the deposit which was returned. The respondent's solicitors having had no reply wrote again on April 21, 1978 to confirm that 'until the full purchase price has been paid the titles would not be transferred into the names of the purchasers' and gave notice that the respondent would withdraw his offer to sell the land unless some definite terms acceptable to him were suggested and a reply was received within a week.

As there was again no response, the respondent's solicitors wrote to Lim Cheng Chuan & Co. on May 2, 1978 to intimate that all negotiations had terminated and requesting the return of the title deeds sent to them previously. Then Lim Cheng Chuan & Co. wrote to the respondent's solicitors on May 5, 1978 agreeing to vary the terms of the sale by amending clause 4 of the draft agreement to the effect that the transfer of the land would be made upon receipt of the full purchase price. Nothing was said as to the requirement of the respondent intimated in the letter of February 22 for a stipulation to the effect that the whole outstanding balance would become due on default of payment of any one instalment. To this not unexpectedly the respondent's solicitors replied on May 8, 1978 stating that the respondent had terminated all negotiations in the matter and requesting the removal of the caveat lodged against the land.

On the basis of this correspondence the respondent raises several matters to contend that there was in fact no concluded contract which can be specifically performed. The respondent submits that there was no contract because the letter of February 6 was not an acceptance and it did not take in all the circumstances and moreover the offer came from Chong Keat Sdn. Bhd., and the supposed acceptance, if any, was addressed to the 2nd appellant, that the parties were different and if the matter were confined simply to the letters of February 3 and 6, 1978 it is quite uncertain who the parties to the alleged contract were at that time supposed to be. It is argued for him that the letters were silent on major matters which were not dealt with and there were insufficient ingredients to constitute a binding and enforceable contract. The respondent contends that if the letter of February 6 constituted an acceptance it was conditional on a formal contract being drawn up and that the reference by the respondent to his leaving the technical details to his lawyers had the same effect as that in *Von Hatzfeldt-Wildenburg* v. *Alexander*[3] where the purchaser stipulated that her acceptance was subject to *inter alia* a condition that her solicitors should "approve the title to and covenants contained in the lease, the title from the freeholder and the form of contract", and it was held on the construction of the documents not to be a complete contract susceptible of being enforced by way of specific performance. And again in *Lockett* v. *Norman-Wright*[4] an agreement to grant a lease "subject to suitable agreements being arranged between your solicitors and mine" did not constitute an absolute contract which could be enforced as the expression in question was a condition precedent to any concluded bargain. It is said for the respondent that in his letter of February 6 he was implying that he would leave to his lawyers not only the technical drafting of an agreement but the way in which the technical details were themselves to be agreed in view of the new terms introduced into the negotiations by the letter of February 3.

The respondent further submits that even if the letters of February 3 and 6 could amount to a contract the matter must be considered in the light of the whole of the correspondence that ensued, and that if agreement had been reached on all points then further correspondence to vary would not affect the position but that if the letters purporting to constitute the contract only dealt with some matters and further points were brought in then there would be no concluded contract. In *Hussey* v. *Horne-Payne*[5] there were certain letters which apparently constituted a complete contract, but on looking into the whole correspondence, it was found that those letters did not contain all the terms of the contract, and the decision in that case is to the effect that if two letters standing alone would be evidence of a sufficient contract, yet a negotiation for an important term of the purchase and sale carried on afterwards is enough to show that the contract was not complete. We would also think it useful to refer to two very recent authorities not cited to us which bear on this question. In *Gibson* v. *Manchester City Council*[6] Lord Diplock said (at page 297):

> "My Lords, there may be certain types of contract, though I think they are exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an exchange of correspondence between the parties in which the successive communications other than the first are in reply to one another, is not one of these. I can see no reason in the instant case for departing from the conventional approach of looking at the handful of documents relied upon as constituting the contract sued upon and seeing whether upon their true construction there is to be found in them a contractual offer by the corporation to sell the house to Mr. Gibson and an acceptance of that offer by Mr. Gibson. I venture to think that it was by departing from this conventional approach that the majority of the Court of Appeal was led into error."

And in *Butler Machine Tool Co. Ltd.* v. *Ex-Cell-O Corporation (England) Ltd.*[7] Lord Denning M.R. said (at page 405) that the documents passing between the parties have to be considered and construed as a whole in determining the formation of a contract by way of

offer and acceptance. The respondent also argues that he was entitled to withdraw and did indeed withdraw before the acceptance of the amended terms. He contends the contract is too vague to be specifically enforced without the court writing the contract for the parties and that this is manifest from the minutes of the judgment annexed to the Order 14A summons, and further that specific performance will affect the lien the bank has on the land.

It clearly therefore appears from the facts and the law in the circumstances of this case that there are in fact highly triable issues in this matter but the learned judge however came to a firm conclusion that there was no binding and enforceable contract at all and thought it a waste of time for the matter to go to trial, and quite apart from dismissing the appellants' application under Order 14A also dismissed the action itself as well, purporting to follow and apply *Bigg & Anor.* v. *Boyd Gibbins Ltd.*[1] That was an appeal before the Court of Appeal in England from an order made for specific performance by Pennycuick V.-C., under Order 86 rule 4 of the Rules of the Supreme Court (equivalent to our Order 14A) but as Russell L.J., makes it clear (at page 184), it was as a consequence of a suggestion that came from the Bench, so as to avoid duplication of proceedings, that it was agreed by counsel, on instructions from their clients, that the appeal should be dealt with as if it was an appeal from the trial of the action, that is to say, the parties consented to the appeal being dealt with as if the hearing before Pennycuick V.-C., was the trial of the action, and the order made by the Court of Appeal (at page 186) quite clearly states:

"Appeal dismissed. By consent, appeal treated as if it were an appeal from a decision on trial of action."

For the purposes of an application under Order 14A (and this would equally apply to Order 14) a judge does not decide the matter as at a trial. His powers in respect of such applications are circumscribed and governed by the terms of Order 14A and the immediately relevant provisions are rules 1(1) and 4. Under rule 1(1) the judge may if the requirements of the earlier part of that sub-rule have been met give judgment in the action for the plaintiff unless the defendant satisfies him that he has a good defence to the action on the merits or discloses facts sufficient to entitle him to defend. If the defendant has so satisfied the judge then by rule 4 he gives the defendant leave to defend either unconditionally or conditionally, that is to say, subject to terms, and where leave to defend is given the judge shall have power to give all such directions as to the further conduct of the action as might be given on a summons for directions under Order 30 and rule 1 of Order 30 shall apply. There is hardly any doubt that in this case the respondent has shown that he has a good defence to the action on the merits and has disclosed facts sufficient to entitle him to defend, and he should accordingly have been given unconditional leave to defend the action. The learned judge did not however have the power under Order 14A to dismiss the action *ex proprio motu* as he did.

We should perhaps, apropos of the matter of the learned judge deciding in favour of the respondent on the question of the existence *vel non* of a concluded contract in the Order 14A summons, refer to the remarks of Russell L.J., in *Bigg & Anor.* v. *Boyd Gibbins Ltd.* (*supra*, at page 184) to this effect:

"With the matter being dealt with under Rules of the Supreme Court Order 86 (our Order 14A), it is I think right to say that an order should be made only if the judge thinks it is a plain case and ought not therefore to be tried. Speaking for myself, I should have thought that it would be sensible that if one has simply a short matter of construction, with a few documents, the learned judge on this summary application should simply decide what is in his judgment the true construction. There could be no reason to go formally to trial (except that one might possibly come before another judge) where no further facts could emerge which would throw any light at all on the letters that have to be construed."

It is clear that Russell L.J., in speaking of an order in a plain case which ought not to proceed to trial, is in fact referring to judgment for the plaintiff in the action in an application for summary judgment. If in a short matter of construction of a few documents in a plain case the judge is minded to find conclusively for the defendant, still the only order open to him would be to give unconditional leave to defend the action, and in any event the judge's conclusion as such will not be reflected in the formal order. All that he is required to find in order to give leave to defend is specified in rule 1(1) of Order 14A. Russell L.J.'s observations clearly envisage the matter going to trial before the same judge as he specifically refers to the possibility of the action coming on for trial before another as an exception, and he carefully qualifies and restricts his statement to where no further facts could emerge which would affect the matter. In the matter under appeal before us the learned judge had before him a mixed question of law and fact involving perhaps the necessity of parol evidence being adduced as has been indicated, and we would add that no pleadings have as yet been filed or delivered in this action.

Mr. Hepworth however, as we have said earlier, maintains that the learned judge acted quite correctly and properly in dismissing the action as he did and cited several authorities in this connection which we regret to say are in our view wholly irrelevant as they pertain to the question of *res judicata,* and are briefly and broadly to the effect that an interlocutory judgment which definitely decides a question of law and from which no appeal is taken may be *res judicata* when the question is raised between the same parties even in the same action. No such question of *res judicata* can arise in this matter as the learned judge cannot in fact in so far as the defence is concerned determine any issue in an application under Order 14A with finality as at a trial and can only apply his mind to the question of whether or not the respondent has satisfied him that he has a good defence on the merits or has disclosed facts sufficient to entitle him to defend and no more, and more particularly so in view of the likelihood of the introduction of oral evidence we have adumbrated.

Mr. Hepworth then submits that in any event it was open to the learned judge to dismiss the action as he did if it was plain that the action must fail and relies on the provisions of Order 30 rule 1(3) which provide that on an application under Order 14 or Order

14A the judge may give any such directions as he could give on a summons for directions. We cannot but reject this submission. As we have earlier pointed out, there is already provision in rule 4 of Order 14A to the same effect, and the provision in rule 4 of the power to give all such directions as to the further conduct of the action as might be given on a summons for directions only where leave to defend is given would clearly negate any power to dismiss an action peremptorily *ex mero motu* where an order for leave to defend is the only recourse open under rule 1(1). If in fact any such power in the judge to dismiss an action of his own motion in an Order 14A application was intended, it should be and would have been expressly so provided for in Order 14A itself on the lines of Order 25 rule 3 which is sequential to rule 2 of Order 25, and we would reiterate that the provisions of rule 4 of Order 14A clearly indicate the contrary.

If the respondent wanted the issue of whether or not there was a binding contract determined as a preliminary point and the dismissal of the action in the event this was found in his favour and pleadings had been delivered and the point raised therein, he could then have gone about this by a separate application initially or after succeeding in getting leave to defend by seeking directions under Order 14A rule 4 for a trial of a preliminary issue of law and the dismissal of the action under Order 25 rules 2 and 3 if he could meet the requirements therefor but it would certainly not be open to him to have this done as the end result of the Order 14A application itself. Mr. Hepworth frankly admits that he is unable to find a single authority where an issue had been finally determined in favour of a defendant and the action dismissed in an application under Order 14 or Order 14A by a judge acting *suo motu*. This is not surprising as the dearth or rather absence of authority would indicate that the point in question is clear and unexceptionable, and we would think it was a situation such as this which prompted James L.J., to remark in *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha, and Telegraph Works Company*[8] (at page 526):

"It is said that there is no authority and no dictum to that effect. The clearer a thing is, the more difficult it is to find any express authority or any dictum exactly to the point."

In the event we find that all that was open to the learned judge to do in regard to the appellants' application for summary judgment under Order 14A was to give the respondent unconditional leave to defend. We accordingly allow the appeal with costs to the appellants, set aside the order of the learned judge made on January 17, 1979 in so far as it relates to the appellants' application under Order 14A and the dismissal of the action and give the respondent unconditional leave to defend the action. The costs below will be in the cause and the deposit lodged in court by way of security for costs is to be paid out to the appellants.

Appeal allowed.

Solicitors: *Lim Kean Chye & Co.; Lewis & Co.*

SENIWISMA S & O AKITEK PLANNER v. PERUSAHAAN HIAZ SDN. BHD.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) November 5, 1979 & February 14, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 52 of 1978]

Practice and Procedure — Claim by architects for preparation of lay-out plan — Lay-out plan not submitted by architects for approval — Defence — Whether architects entitled to obtain summary judgment — Triable issues — R.S.C. 1957, O. 14.

Architects — Fees — Scale of Fees — Architects Act, 1967, s. 4(d).

Contract — Engagement of architect — Whether duty of architect to submit plans for approval — Fees — Not in accordance with fees fixed by Board of Architects — Whether contract illegal — Architects Act, 1967, s. 4(d).

In this case the appellants, who were architects, claimed under an agreement under which they were engaged to prepare a layout plan for housing development. The layout plan was not submitted for approval by the architects but by the respondents themselves. The plan was not approved but approval was given to another amended plan. The respondents offered $800 for the work done but the appellants claimed the sum of $65,500. The respondents also claimed that the charges should be in accordance with the Institute of Architects' scale of fees but this was disputed by the appellants. The Assistant Registrar gave the respondents conditional leave to defend upon payment into court of the sum claimed and this was upheld in the High Court. The appellant appealed.

Held: if all the main points had been properly adverted to in the pleadings the finding of the court would have been that there were *bona fide* triable issues in this case. In the circumstances the appeal must be dismissed.

Cases referred to:-

(1) *Gilbert and Partners* v. *Knight* [1968] 2 All E.R. 248.
(2) *Shanghai Hall Ltd.* v. *Town House Hotel Ltd.* [1967] 1 M.L.J. 223, 224.
(3) *Jacob* v. *Booth's Distillery Co.* (1901) 85 L.T. 262.
(4) *Fieldrank Ltd.* v. *Stein* [1961] 3 All E.R. 681.

FEDERAL COURT.

C.H. Cheah for the appellants.

A.M. Sebastian for the respondents.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): This is appeal is against the decision of the High Court at Kuala Lumpur upholding the order of the Assistant Registrar whereby he rejected the appellants' application for final judgment under Order 14 and granted the respondents conditional leave to defend the appellants' action upon payment into court of the sum claimed, $65,500.

The appellants, who are Architects, claim that under an agreement contained in two letters dated September 12, 1974 and October 20, 1974 the respondents engaged the appellants as architects to prepare a layout plan for housing development on a piece of land in Klang which was submitted to the relevant authorities for approval; by paragraph 4 of the letter dated September 12, 1974 in the preparation of the layout plan it was agreed that the professional fees were as follows:

"When project is to be proceeded with to full service, a fix fee per lot shall be charged on a scale of $50 per lot for the first 10 lots and $25 for each additional lots. *BUT* when a project is not proceeded with to full service a fix fee per lot shall be charged on a scale of $100 per lot for each